FILE COPY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 619

THE MASON & DIXON LINES, INC.
Petitioner

v.

GENERAL ELECTRIC COMPANY,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioner, The Mason & Dixon Lines, Inc., prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit entered in the above case on September 16, 1959, petition for rehearing having been filed October 12, 1959, and having been denied November 25, 1959.

Opinions Below

The opinion of the United States District Court for the Western District of Virginia is reported in 170 F. Supp. 698, and is annexed to the record of the Court below (R. 222 to 238).

The original opinion of the United States Court of Appeals for the Fourth Circuit is reported in 270 F. 2d 780, and is printed herein as Appendix A.

The opinion of the United States Court of Appeals for the Fourth Circuit denying the petition for rehearing has not yet been reported but is printed herein as Appendix B.

Record references herein are to Volume I of the Record below.

Jurisdiction

The judgment of the Court of Appeals for the Fourth Circuit was entered on September 16, 1959. A timely petition for rehearing of that portion of the decision awarding indemnity to General Electric Company from Petitioner was filed on October 12, 1959, and was denied November 25, 1959. The jurisdiction of this Court is invoked under 28 U.S.C.A. Sec. 1254 (1).

Questions Presented

(1) Whether, in an action based on implied indemnity, a shipper is entitled as a matter of law to complete indemnity from a motor carrier for damages paid carrier's employee, injured by overturned truck, where shipper negligently loaded truck and refused to correct dangerous condition when requested by carrier to do so; or whether the carrier is entitled at least to a jury trial of issues of fact, and inferences to be drawn from facts, under appropriate instructions relating to shipper's right to indemnity.

(2) Whether, in an action based on implied indemnity, brought by a shipper against a motor carrier, I. C. C. safety regulations, designed for protection of the public, (49 C. F. R. 192.9 (a) (b), 193.9 (a) (b)), supersede the contractual obligation of the shipper to load and brace

heavy or bulk articles established by Rules 21 and 22 of the published Tariff of the Southern Motor Carriers on file with the I. C. C.

Constitutional Provision Involved

The Seventh Amendment to the Constitution provides:

> "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

Statutes and Regulations Involved

(1) Rule 21, *Heavy or Bulky Articles, Loading or Unloading* and Rule 22, *Dunnage or Temporary Blocking, Racks, Standards, Supports, etc.* of published tariff Southern Motor Carriers, National Motor Freight Classification No. A-3 MF-1 C.C. No. 8, full texts of which are set forth in Appendix A, pages A-9 and A-10.

(2) 49 C.F.R. 192.9 (a) and (b) and 49 C.F.R. 193.9 (a) and (b) full texts of which are set forth in Appendix A, page A-10.

STATEMENT

Originally, Kelly Moretz, a citizen of Tennessee, and an over-the-road truck driver employed by Petitioner, The Mason & Dixon Lines, Incorporated, filed a personal injury action in the District Court for the Western District of Virginia against General Electric Company, a New York Corporation, as a result of injuries suffered when a tractor-trailer Moretz was driving turned over on Highway U. S. 11, near Salem, Virginia. (R. 1) Federal jurisdiction was predicated upon diversity of citizenship. (28 U. S. C. A. §1332.)

Moretz claimed the trailer he was hauling had been negligently loaded (with heavy electrical control panels) by the General Electric Company at its Salem Plant, and that General Electric had not installed bracing of the panels required to make the load secure. (R. 4)

Moretz based his claim on the violation by General Electric of certain Interstate Commerce Commission Rules, specifically Rules 21 and 22 of the National Motor Freight Classification, No. A-3, MF-L C. C. No. 8 (R. 7). He claimed a jury trial. (R. 8)

Subsequently, General Electric filed a third-party complaint against Petitioner, The Mason & Dixon Lines, Incorporated, the employer of Moretz, claiming right of indemnity from Mason & Dixon in the event General Electric should be held liable to Moretz. (R. 20)

Jury trial was had before Judge Thompson in the negligence action of Moretz v. General Electric. (R. 29)

Prior to this trial, Petitioner Mason & Dixon moved the court to dismiss the third-party indemnity action by General Electric on the ground that the "exclusive liability" clause in the Tennessee Workman's Compensation Act was a bar to any claim by General Electric for indemnity as a result of liability to Mason & Dixon's employee who was injured in the course of his employment. (R. 32, 38)

The trial court overruled the motion prior to and during the trial. (R. 32, 121, 191)

At the conclusion of the evidence, the trial court charged the jury in the negligence action covering the various theories of General Electric's liability to Moretz, and after receiving the verdict in favor of Moretz in the amount of $35,000, the court said:

"The Court: Now, Ladies and Gentlemen, I indicated to you in my charge that you could not bring

in a verdict against the Mason & Dixon Lines. There is a legal question involved and I want to submit to you an interrogatory for your consideration. You have heard the instructions I have given you in respect to the duties of all the parties to this action. I now want to submit to you the following Interrogatory:

Interrogatory to the Jury

"Was the Mason & Dixon Lines, Incorporated, guilty of negligence which proximately contributed to the accident and resulting injuries to Kelly C. Moretz?" (R. 211)

The above was the entire charge on the indemnity feature of this case.

The jury's answer was:

"We, the Jury, find that Mason & Dixon was guilty of negligence which proximately contributed to the accident and resulting injuries of Kelly C. Moretz." (R. 212)

After receiving the jury finding, the trial court took the whole case under consideration and ultimately sustained Mason & Dixon's original motion to be dismissed as a third-party defendant. (R. 240) The trial court held, first, that under the facts of the case, the duty to load and brace the electrical panels was upon General Electric and that no contract for safe loading could be spelled out as to Mason & Dixon on which to base a claim for indemnity; second, that the Tennessee Workman's Compensation Act's "exclusive liability" clause was a bar to General Electric's claim. (R. 234)

Appeal was taken to the Court of Appeals for the Fourth Circuit by General Electric on all phases of the case.

The Fourth Circuit affirmed the District Court in the personal injury action, but entered up final judgment in favor of General Electric against Mason & Dixon in the indemnity action.

Rehearing was requested by Petitioner, Mason & Dixon, on the indemnity aspect of the case, but a rehearing was refused.

The personal injury judgment of Moretz has been paid by General Electric.

The following evidence, insofar as indemnity is concerned, is not in dispute:

(1) Kelly Moretz, the Mason & Dixon truck driver, was injured while in the course of employment and covered by Workman's Compensation when his tractor-trailer turned over because its load of heavy, electrical control panels shifted suddenly. (R. 105, 114, 116)

(2) The equipment shifted because the panels were negligently loaded and not adequately braced. The jury's finding is conclusive on this point.

(3) General Electric, the shipper and manufacturer of the panels, had a written contractual obligation to load and brace the equipment in question. The obligation was spelled out in Rules 21 and 22 of the Southern Motor Carriers Tariff, on file with the Interstate Commerce Commission; and General Electric did in fact load the trailer at its Salem, Virginia plant. (R. 60, 64, 133-137)

(4) General Electric, the shipper, had a great deal of experience with the best methods of loading and bracing its own, heavy, bulky, specialized product for transportation. (R. 129, 138, 139, 140)

(5) The faulty loading of the equipment was called to the attention of the shipper by the carrier's representative; the shipper was requested to correct the defect and refused to do so, contending that the load was satisfactorily distributed and braced. (R. 76)

(6) As the direct and proximate result of the shipper's negligence in loading the panels improperly, the carrier's truck driver was injured. The jury finding in the injury action is conclusive.

(7) Mason & Dixon, the carrier, had knowledge of the improper loading by the shipper and failed to correct the condition before its driver took the load out on the road. (R. 83, 97)

The Court of Appeals has found that no jury issue relative to the question of indemnity was presented by this evidence.

Conceding that the contractual relationship between the shipper and carrier required the shipper to load and brace the equipment, and notwithstanding the admitted failure of the shipper to perform this obligation in the original instance and again when requested by the carrier to act, the Court of Appeals made a factual determination that General Electric's conduct entitled the shipper to indemnity *as a matter of law* because "the default of the shipper in the pending case was no greater than that of the shipowner in the cited cases." (Appendix A, page A-15)

Further, in its written opinion denying Petitioner's request for rehearing, the Fourth Circuit apparently found that the only question which is properly submitted to a jury in a claim for indemnity arising out of an alleged breach of warranty for workmanlike service is the conduct of the indemnitee; that whether the conduct of the indemnitor is sufficient to preclude recovery is always a question of law for the court.

REASONS FOR GRANTING THE WRIT

I. *The entry of judgment in the Court of Appeals for respondent has deprived petitioner of its constitutional right to a jury trial.*

Weyerhaeuser S. S. Co. v. Nacirema Company, 355 U.S. 563, 2 L. Ed. 2d 491, 78 S. Ct. 438 (1958) was decided by this Court on the single issue of the right of one seeking indemnity by way of a third-party complaint to have a jury determination of the factual issues involved.

At 355 U.S. 563 at 567, 568 this Court has said:

> "If in that regard respondent (stevedore) rendered a sub-standard performance which led to foreseeable liability of petitioner (shipowner), the latter was entitled to indemnity *absent conduct on its part sufficient to preclude recovery*. The evidence bearing on these issues . . . was for jury consideration under appropriate instructions. These issues were not encompassed by the instructions in the main case, where the test of petitioner's liability was based on failure to perform a non-delegable duty to Connolly. Since the liability of respondent depended on *different principles* . . . all fact issues involved in the third-party action should have been submitted to the jury after the verdict in the main case." (Emphasis supplied.)

Further, this Court wrote at page 569:

> "In view of the new trial to which petitioner is entitled, we believe sound judicial administration requires us to point out that in the area of contractual indemnity an application of the theories of 'active' or 'passive' as well as 'primary' or 'secondary' negligence is inappropriate . . ."

A reading of *Weyerhaeuser* nowhere discloses that this Court intended the Constitutional guarantee of a jury trial to extend to the party seeking indemnity but to be withdrawn from the one against whom the claim was made.

Weyerhaeuser would appear to make eminently plain the test or standard against which a claim for indemnity based on implied contract must be framed:

(a) Substandard performance leading to foreseeable liability by one party to the contract;

(b) Freedom from conduct on the part of the other party sufficient to preclude recovery.

Although *Weyerhaeuser* does not attempt to delineate the character of conduct which is sufficient to preclude recovery on the part of one seeking indemnity based on implied contract, common sense would indicate that *some type of conduct* must be sufficient to bar a claim for indemnity.

A common sense interpretation of *Weyerhaeuser* would also seem to require that if this Court holds the evidence bearing on the substandard performance of one of the parties to the implied contract is for "jury consideration under appropriate instructions," after the jury has been instructed on the different principles applicable to an indemnity action, this Court would not deny consideration by a jury of any conduct of the party seeking indemnity which might preclude recovery.

See *Shultz* v. *Pennsylvania R. Co.*, 350 U. S. 523, 100 L. Ed. 668, 76 S. Ct. 608 (1956):

> "The very essence of its function (the jury's) is to select from among conflicting inferences and conclusions that which it considers most reasonable." 350 U. S. 523 at 526.

No serious contention can be made in the instant case that the jury was permitted to consider the conduct of General Electric in the third-party indemnity action. The jury, of course, in the main case, found that General Electric, the shipper, negligently breached its obligation to load and brace the equipment, for this was the sole basis of the plaintiff's verdict.

Petitioner respectfully dissents from the statement of the Court of Appeals in its opinion denying rehearing

that: "In the pending case the admonition of the *Weyerhaeuser* case was followed." (Appendix B, page B-4). The record simply does not support this statement. In the indemnity action, not only did the trial judge fail to charge the jury on any aspect of the principles of an indemnity case, but the Trial Judge asked the jury the single question of whether or not the carrier was negligent. Thus, the most that a jury ever determined at the trial level was that the shipper and carrier were two, active, tort-feasors, a finding which could never support an award of indemnity in this case. *Halcyon Lines* v. *Haenn Ship Ceiling & Refitting Corp.*, 342 U. S. 282, 96 L. Ed. 318, 74 S. Ct. 277 (1952).

The issue of Respondent General Electric's conduct and its effect on General Electric's right to indemnity were matters for the jury. To deny Petitioner at least a jury determination as to the nature and extent of Respondent's admitted breach of its agreement to load and brace, as it pertains to the indemnity action, was an extreme departure from precedent.

II. *The decision of the Court of Appeals for the Fourth Circuit appears in conflict with Ryan Stevedoring Co.* v. *Pan-Atlantic Steamship Corp.*, 350 *U.S.* 124, 100 *L. Ed.* 133, 76 *S. Ct.* 232 (1956) *and unduly extends the scope of that decision; it is also in conflict with the decision of the Court of Appeals for the Third Circuit in Haguns* v. *Farrell Lines*, 237 *F. 2d* 477 (*3rd Cir.* 1956) *and potentially in conflict with the case of General Electric Company* v. *Irvin and The Mason & Dixon Lines, Inc. now pending before the Court of Appeals for the Sixth Circuit; it further decides a Federal question involving Interstate Commerce Commission regulations in a way that conflicts with applicable decisions of this Court.*

Petitioner concedes that *Ryan* stands for the proposition that one who contracts to perform a service impliedly

agrees to indemnify for damages foreseeably resulting from the contractor's improper performance, Workmen's Compensation statutes notwithstanding.

Petitioner does not agree, however, that *Ryan's* holding should be so extended as to be controlling under the facts of the instant case. Nor does Petitioner believe the Court of Appeals was justified in extending a factual analysis of the several maritime cases involving implied indemnity as the factual test of the default of the motor freight shipper in the pending case.

Ryan and the various "shipping" cases were concerned exclusively with interpreting the stevedoring contract. The latter bears no resemblance to the contractual relationship between a motor freight carrier and the shipper of heavy and bulky goods. The Court of Appeals does not appear to recognize any distinction in attempting to look at the scope of the undertakings between General Electric and Mason & Dixon and comparing the default of General Electric to that of the shipowner.

Moreover, the very portion of *Ryan* quoted by the Court of Appeals points out, at 350 U. S. 134, that as between the contracting parties, one who warrants a particular service cannot use the other party's failure to discover and correct its own breach of warranty as an excuse.

In the instant case, no fact is more plain than that General Electric contracted to load and brace the control panels on Mason & Dixon's trailer; that General Electric breached its obligation in this regard; and that Mason & Dixon simply failed to discover and correct General Electric's own breach.

Under the language of *Ryan*, had Mason & Dixon suffered financial loss it would seem to have been entitled to indemnity from General Electric.

Furthermore, this decision, if permitted to stand, extends the indemnity doctrine of *Ryan* prouounced

wholly in a maritime context into the field of interstate commerce. Since four members of this Court disagreed with the establishment of the *Ryan* indemnity doctrine in the maritime arena, it is submitted as urgent that the instant decision, which extends the *Ryan* principle to non-maritime areas, be reviewed by this Court.

Petitioner also submits as grounds for the granting of this petition that three members of this Court recently dissented from an extension of the *Ryan* doctrine—even in the maritime field—to a situation where the party seeking indemnity created the dangerous condition which gave rise to the judgment for which indemnity was later sought. (Dissent by Justices Harlan, Frankfurter, and Whittaker in *Crumady* v. *The J. H. Fisser*, 358 U.S. 423, 3 L. Ed. 2d 413, 79 S. Ct. 445 (1959).) In the instant case, as in *Crumady*, the party required to indemnify at most brought into play a dangerous condition created by the party seeking indemnity.

A somewhat similar situation prevailed in the shipping case of *Hagans* v. *Farrel Lines*, 237 F. (2d) 477 (3rd Cir., 1956), which was decided after *Ryan*, where a stevedore's injuries were found to be the result of the shipowner's own breach of contract, which at the same time violated its duty to the longshoreman and to the stevedore. The Third Circuit had no difficulty in denying the shipowner's claim against the stevedore for indemnity.

Here General Electric owed the truck driver Moretz precisely the same duty as it owed the trucking line, Mason & Dixon—to load and brace the equipment. It violated this duty and Moretz was injured. General Electric should not be permitted to profit by its own wrong; to use Mason & Dixon's failure to discover and correct the former's improper performance as the sole basis for a factual determination, made initially at the appellate level, to award indemnity.

A case identical in most essential respects with the present case is *Irvin v. General Electric Company*, Civil No. 1275, E. D. Tenn., October 9, 1958. That case, in which General Electric also brought a third-party action against The Mason & Dixon Lines, Inc. for indemnity, gave rise to a result in the District Court for the Eastern District of Tennessee contrary to the opinion by the Fourth Circuit Court of Appeals in the instant case. The denial of indemnity by the District Court, in an unreported opinion, is now on appeal to the United States Court of Appeals for the Sixth Circuit (Docket No. 13,798). The case was argued before the Sixth Circuit Court of Appeals on October 17, 1959, but the opinion of that Court—potentially in conflict with the Fourth Circuit opinion which Petitioner now asks this Court to review—has not yet been rendered.

The time limitation applicable to the filing of this Petition for certiorari prevents Petitioner from awaiting the Sixth Circuit's conclusion in *General Electric Company v. Irvin and The Mason & Dixon Lines, Inc.*

Petitioner submits that the potential direct conflict between decisions of the Fourth and Sixth Circuit Courts of Appeal is an added factor to be accorded considerable weight in this Court's determination of whether to grant a writ of certiorari in this case.

Finally, as an additional means of justifying its award of indemnity to the shipper in the pending case, the Court of Appeals has, in effect, rewritten the motor transportation contract between shipper and carrier in interstate commerce. This is in conflict with prior decisions of this Court.

The Fourth Circuit has found that insofar as the truck driver Moretz was concerned, General Electric had the obligation to load and brace its equipment on the trailer; but that with respect to the trucking line, Mason & Dixon, General Electric had no contractual obligation at all in

this regard. The first conclusion follows, else the personal injury verdict could not stand; if General Electric had no duty to load and brace, then it could not have been guilty of negligence to Moretz. The second conclusion also follows or General Electric would necessarily be guilty of improper performance of its contract with Mason & Dixon.

Yet, the finding of the Fourth Circuit appears to be at variance with its own written opinion, which on page 12 (Appendix A, p. A-11) recognizes this court's well-established rule that tariff and classifications are just as much a part of the contract between shipper and carrier as are other regulations of the Interstate Commerce Commission. See *Louisville & N. R. Co. v. Chatters*, 279 U. S. 320, 331, 73 L. Ed. 711, 719, 49 S. Ct. 327 (1929).

The Court of Appeals explains this variance by stating that the contractual obligation upon General Electric to load "was not intended to shift to the shipper a duty ordinarily imposed upon the carrier." (Appendix A, page A-12). It fails to consider, however, that the duty to load and brace equipment of the nature involved in the pending case was in fact *not* shifted to the carrier, nor is such ever the case with respect to bulky goods transported under the tariff here in question.

Thus, the position of the Court of Appeals is that it has found that Interstate Commerce Commission safety regulations, 49 U.S.C.A., Sec. 319, which the court admits on page 8 of its opinion (Appendix A, p A-8) were "designed for the protection of the public," have the effect of declaring null and void the contractual requirements of the published tariff of Southern Motor Carriers, filed with the Interstate Commerce Commission, and heretofore declared by this Court to be a part of the transportation contract between shipper and carrier.

III. *The question here involved is of utmost importance.*

The instant case is of great significance to the American trucking industry. It represents the first extension of the controversial doctrine of *Ryan* from the shipping industry to the even broader field of motor carriers and, at the same time, apparently alters radically what were thought to be contractual obligations of long standing between shippers and motor carriers respecting certain types of cargo.

Inevitably, from this decision will flow a large number of personal injury actions in the Federal Courts all over the nation. Inevitably, the injured truck drivers will sue the shippers, who in turn will implead the trucking lines and seek indemnity implied in law. The pattern and volume of the shipping cases is sufficient evidence of what lies ahead.

While *Ryan* established the right to indemnity implied in law, and *Weyerhaeuser* framed certain principles for the disposition of these claims, it is obvious that additional clarification of this new, complex and rapidly expanding concept of implied contractual indemnity is urgently needed by both the Bench and the Bar.

CONCLUSION

For the reasons stated, this petition for a writ of certiorari should be granted.

Respectfully submitted,

THE MASON & DIXON LINES, INCORPORATED

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APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 7878.

GENERAL ELECTRIC COMPANY,
Defendant and Third-Party Plaintiff,
Appellant,

versus

KELLY C. MORETZ, Plaintiff,
and
THE MASON & DIXON LINES, INC.,
Third-Party Defendant,
Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF VIRGINIA, AT ROANOKE.
ROBY C. THOMPSON, DISTRICT JUDGE.

(Argued June 22, 1959. Decided September 16, 1959.)

Before SOBELOFF, Chief Judge, SOPER, Circuit Judge, and THOMSEN, District Judge.

John H. Doughty and John H. Locke (Gentry, Locke & Rakes, and Hodges, Doughty & Carson on brief) for Appellant; A. Linwood Holton, Jr., (Eggleston and Holton; Todd & Todd, and Dodson & Dodson on brief.)

for Appellee Kelly C. Moretz; John H. Thornton, Jr., and Duke Duvall (Woods, Rogers, Muse and Walker on brief) for Appellee The Mason & Dixon Lines, Inc.; and Arthur E. Smith and Evans B. Jessee on brief for Liberty Mutual Insurance Company.

SOPER, Circuit Judge:

This suit was brought by Kelly C. Moretz against the General Electric Company for injuries suffered by him while driving a trailer truck in which heavy crated electric control panels and other electrical equipment belonging to General Electric had been negligently loaded. Moretz was an employee of The Mason & Dixon Lines, Inc., a common carrier, which owned the vehicle and undertook the transportation of the shipment. In the first instance, the cargo was placed in the trailer by employees of General Electric at its plant in Salem, Roanoke County, Virginia. It was loaded in such a fashion that an open space was left in the center of the trailer without bracing, allowing the cargo to shift in the course of the subsequent journey. In this condition the trailer was turned over to a pickup driver of Mason & Dixon, who delivered it without mishap to the Mason & Dixon terminal eight or nine miles away at Roanoke, Virginia. There the trailer was sealed and turned over to the plaintiff, an over-the-road driver of Mason & Dixon, to be driven to its ultimate destination in Alabama. No change was made in the disposition of the cargo, although Mason & Dixon had notice that it was improperly stowed. During the subsequent trip the load suddenly shifted as the vehicle rounded a turn in the road near Roanoke, causing the trailer to overturn and injure the driver; and this suit was bought to recover for his injuries.

After the institution of the suit, General Electric filed an answer in which it denied that it had been guilty of any negligence which caused the accident. With the leave of

the court it also filed a third-party complaint against The Mason & Dixon Lines, wherein it alleged that the carrier had the duty to inspect the shipment and to decline it if it was improperly loaded and that its failure to perform these duties was the proximate cause of the accident; and that even if General Electric was guilty of negligence in loading the trailer improperly in the first place, it was entitled to indemnity from the carrier for any damages recovered by the plaintiff since the fault of Mason & Dixon in transporting the goods, with notice of faulty stowage, was so grave as to throw the whole loss upon it.

In response to the third-party action, Mason & Dixon filed an answer, which in effect denied liability, and also moved the court for a separate trial of the issues raised by the plaintiff. In addition, Mason & Dixon moved the court to dismiss the third-party complaint on the ground that the plaintiff in the original suit had been paid compensation for his injuries under the Workmen's Compensation Act of Tennessee as an employee of Mason & Dixon and that under §50-908 of the Tennessee Code the plaintiff's right to compensation was exclusive of all other rights and remedies against his employer. The court, however, declined to pass upon the motion to dismiss at that time and the case of the plaintiff against General Electric proceeded to trial before the jury, in which all parties participated. Prior to the trial the judge announced that the case would be first submitted to the jury on the question of the primary negligence of General Electric and its liability to the plaintiff and that any action thereafter upon the third-party complaint would take the form of a special interrogatory to the jury in order to enable the court to determine the liability of the carrier to indemnify the shipper. Accordingly, the jury were instructed that their verdict must be confined to the issue of the liability of General Electric to the plaintiff and that Mason & Dixon was in the case because of the con-

in Virginia, where the accident occurred, that if a second tention that it was liable to General Electric, but that the jury should not bring in any verdict in favor of the plaintiff against Mason & Dixon. The jury returned a verdict in favor of the plaintiff against General Electric in the sum of $35,000 and thereupon the District Court submitted a special interrogatory to the jury as to whether Mason & Dixon was guilty of negligence which proximately contributed to the accident and the resulting injuries to the plaintiff. The jury answered this interrogatory in the affirmative. The uncontradicted evidence in the case showed that Mason & Dixon transported the goods with knowledge that they were insecurely loaded.

Prior to the trial the Liberty Mutual Insurance Company filed a petition setting forth that it had insured Mason & Dixon against liability under the Workmen's Compensation Act of Tennessee and had paid certain benefits on behalf of the carrier to the plaintiff and it therefore claimed subrogation to the right of the carrier to recover the benefits that it had paid under the Act. After the jury retired to consider the verdict the Insurance Company proved that it had paid, under the statute, the amount of $1665.99 to the plaintiff and in the final judgment of the court it was ordered that the General Electric Company pay this sum to the Insurance Company out of the amount awarded to the plaintiff by the jury's verdict, less ten per cent which was ordered to be paid to plaintiff's attorneys for services rendered.

We consider first the contention of General Electric that a motion for a directed verdict in its favor should have been granted because under the undisputed facts of the case the injuries were not caused by the negligence of General Electric but by the intervening independent negligence of Mason & Dixon and, second, because the plaintiff himself was guilty of contributory negligence. In respect to the first defense, reliance is placed upon the rule

tort-feasor is aware or should be aware of a potential danger created by the negligence of an original tort-feasor and thereafter, by an independent act of negligence brings about an accident, the dangerous condition created by the first actor is regarded merely as an incident which is insulated by the independent wrongful act of the second actor, and the latter's negligence is regarded as the sole proximate cause of the accident. Thus, in *Hubbard* v. *Murray*, 173 Va. 448, a bus which had been carelessly parked on the highway in violation of the statute was struck in the rear, in broad daylight, by a carelessly driven truck which then careened across the road and killed an occupant of an oncoming car, and it was held that the driver of the truck was liable for the accident. See also *Edgerton* v. *Norfolk Southern Bus Corp.*, 187 Va. 642.

The District Judge correctly held that this rule is not applicable in the pending case because there was no independent act of negligence but merely passive inaction on the part of Mason & Dixon in failing to correct the dangerous condition which General Electric had created. The general rule in such a situation is set forth in the Restatement of Torts as follows:

> "§452. Failure of a third person to perform a duty owing to another to protect him from harm threatened by the actor's negligent conduct is not a superseding cause of the other's harm.
>
> "Comment:
>
> a. . . . The third person's failure to perform his duty in this respect makes him concurrently liable with the negligent actor for any harm which results from the actor's negligence and which would have been prevented by the performance of the third person's duty."[1]

[1] The Virginia authorities are in accord with this rule. *Clinchfield Coal Corp.* v. *Ray*, 121 Va. 318; 93 S. E. 601 (1917); *Chesapeake & O. R. Co.* v. *Crumm*, 140 Va. 33; 125 S. E. 301 (1924); *Scott* v. *Simms*, 188 Va. 808; 51 S. E. 2d 250 (1949).

We had occasion to consider a similar question in *Pierce v. Ford Motor Co.*, 4 Cir., 190 F. 2d 910, where the negligence of the manufacturer in delivering a defective car to a dealer in Virginia led to an accident and the defense was that the car had been subsequently inspected by an employee of the dealer. In overruling the defense we said (p. 913):

> "It is argued that any negligence of the manufacturer in turning out a defective car is insulated by that of a mechanic who inspects it afterwards so that the latter will be deemed the proximate cause of any injury resulting from its defective condition; but this argument is entirely without merit. As said in Harper on Torts, ch. 7 §106, quoted in Foley v. Pittsburgh-Des Moines Co., 363 Pa. 1, 68 A. 2d 517, 529: 'A negligent defendant cannot escape liability because of a failure on the part of some third person to perform an affirmative duty which, if properly performed, would have enabled the plaintiff to avoid the risk created by the defendant's negligence. The failure of the other to inspect adequately may make him liable to the party harmed, but it will not relieve the defendant whose negligence was responsible for the hazard in the first place.'
>
> "As we pointed out in Atlantic Greyhound Corp. v. McDonald, 4 Cir., 125 F. 2d 849, 852: 'It is well settled under the law of Virginia that "a cause, to be a superseding cause, must entirely supersede the operation of the negligence of the defendant, so that such cause alone, without the defendant's negligence contributing in the slightest degree thereto, in fact produced the injury."'"

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[1] For the reasons given above, the judge correctly refused a charge requested by General Electric in the pending case that even if it was guilty of prior neglect the verdict should be in its favor if the jury found that Mason & Dixon saw or should have seen the defect and danger and had an opportunity to correct it but failed to do so.

In the next place, General Electric contends that the plaintiff was guilty of contributory negligence because he did not inspect the fastening of the load and make sure that it was securely in place before he started on his drive to Alabama. The Interstate Commerce Commission, acting under the authority of 49 U.S.C. 304, has promulgated certain rules and regulations regarding the transportion of property by motor carrier. These regulations provide amongst other things that "no motor vehicle shall be driven unless the driver thereof shall have satisfied himself that the tailboard or tailgate, tarpaulins, spare tires, and all means of fastening the load are securely in place," 49 C.F.R. 193.9(b). The gist of the contention is that the plaintiff did not make the inspection required by these regulations before starting out on the trip. He had nothing to do originally with the loading of the vehicle at the General Electric plant or with the inspection of it after it was delivered by the pickup driver to the terminal of the carrier at Roanoke. The latter driver reported to the officials in charge at the terminal that the load had not been braced, but no change in its disposition was made. Before the vehicle was turned over to the plaintiff to be driven to its ultimate destination, the doors were sealed and it was covered by tarpaulin secured to the sides of the vehicle, so that he could not see or inspect the load before he started out without breaking the seal; and he had no authority to do this under the rules of his employer. He did, however, inspect the tires, the lights, and the fastenings of the trailer to see if they were secure, and checked to see if the doors were properly fastened, and found all of these items in good shape.

No specific instructions to the jury on this point were requested by the defendant, but the contention is that the request for a directed verdict should have been granted because the driver did not satisfy himself that the load was securely fastened as required by the regulations. In

our opinion, under the circumstances related, the motion for a directed verdict on this point was properly refused. Undoubtedly it was the duty of the driver to make the required inspection and had he failed to do so he might well have been charged with contributory negligence for violation of a regulation designed for the protection of the public; but we cannot say that it was his duty to disobey the rules of his employer and break the seal which had been placed on the doors of the truck before it was put in his charge. There was evidence from which the jury might find that it was not unreasonable on his part to infer from the sealing of the doors of the truck that the load had been properly secured by the agents of the carrier and thus satisfy himself that the cargo was ready for carriage over the public highway. In this connection, the judge charged the jury that the evidence showed that the plaintiff had no knowledge of the manner in which the cargo was loaded as the trailer had been sealed before it was turned over to him, and that the knowledge of the other employees of the carrier of the manner in which the cargo was loaded was not to be imputed to him since he himself had no knowledge of the manner in which it had been stowed. At the conclusion of the charge the attorneys for both sides, in response to an inquiry of the court, stated that they had no objections to urge.

We conclude that there was substantial evidence to support the verdict against General Electric and we come to its alternate contention that even if its careless loading of the cargo contributed to the accident, it is nevertheless entitled to indemnity from Mason & Dixon, the carrier, because of the latter's failure to secure the load safely before sending it on the road. This neglect on the carrier's part was clearly established by the uncontradicted evidence and by the answer of the jury to the special interrogatory submitted to them after they had found their verdict in favor of the plaintiff against General Electric.

The question of indemnity came before the court on the motion of General Electric to set aside the verdict and enter judgment in its favor or, in the alternative, to enter judgment in its favor against Mason & Dixon for the amount of the verdict on the ground that Mason & Dixon as the carrier of the goods was the principal offender.

The judge overruled this motion. He was of the opinion that General Electric was not entitled to the right of indemnity against Mason & Dixon unless it could be found in the contractual relationship between them, and he held that the contract gave General Electric no such right. The bill of lading covering the shipment was issued under a published tariff of Southern Motors Carriers, filed with the Interstate Commerce Commission and the Virginia Corporation Commission, which provided in Rule 21 that an article weighing 500-pounds or more or exceeding 8-feet in its greatest dimension and 4-feet in each intermediate dimension should be loaded by the shipper.* Since General Electric, in obedience to Rule 21,

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* Rule 21. *Heavy or Bulky Articles, Loading or Unloading.* Sec. 1. Where an article (or articles) in a single container or shipping form tendered, weighs 500 lbs. or more, or if the greatest dimension exceeds 8 feet or greater and intermediate dimension each exceeds 4 feet, loading or unloading shall be performed by the shipper or consignee, as the case may be. If requested, carriers will undertake, in behalf of the shipper or consignee, as the case may be, to employ additional help. No charge will be made for labor performed by the truck driver, but a charge of one dollar and fifty cents ($1.50) per hour or fraction thereof, for each man furnished, other than the truck driver, shall apply from time vehicle arrives at the place of pick-up or delivery until shipment is loaded or unloaded, as the case may be.

Exception—The provisions of Sec. 1 will not apply if such article (or articles), weighing less than 500 pounds

(a) exceeds 8 feet but does not exceed 22 feet in its greatest dimension and does not exceed 2 feet in any other dimension, or

(b) if it does not exceed 10 feet in its greatest dimension and does not exceed 5 feet in its intermediate dimension and does not exceed 1 foot in its least dimension.

Rule 22. *Dunnage or Temporary Blocking, Racks, Standards, Supports, etc.* Any temporary blocking, flooring or lining racks, standards, strips, stakes, or similar bracing, dunnage or supports not constituting a part of the vehicle when required to protect and make shipments subject to other than LTL or AQ ratings or rates secured for transportation must be furnished and installed by the shipper, except that such materials as may be furnished by the shipper will be installed by the carrier at a charge for labor

undertook the performance of this duty but performed it so carelessly that the driver was injured, the judge held that it could not now demand indemnity from the carrier. These provisions of the tariff relating to the shipper, however, tell only a part of the story. Regulations issued by the Interstate Commerce Commission, under the authority of 49 U.S.C. §304, impose specific duties upon the carrier of the cargo. They provide that no motor carrier shall permit any motor vehicle to be driven if the load thereon is so improperly distributed or so inadequately secured as to prevent its safe operation; and that the load shall be properly distributed, and if necessary secured, in order to prevent unsafe shifting of the load or unsafe operation of the vehicle. See 49 C.F.R. 192.9 (a), (b) and 193.9(a), (b).* These regulations were not overlooked in the decision below but it was thought that they merely imposed a duty upon the carrier to protect the general public and did not form a part of the contract between the shipper and the carrier; and since the plaintiff was not a member of the general public but an employee of Mason & Dixon his rights as to his employer were fixed by the Workmen's Compensation Act of Tennessee.

* 49 C.F.R. 192.9 (a) *Distribution and securing of load.* No motor vehicle shall be driven nor shall any motor carrier permit or require any motor vehicle to be driven if it is so loaded, or if the load thereon is so improperly distributed or so inadequately secured, as to prevent its safe operation.

(b) *Doors, tarpaulins, tailgates, and other equipment.* No motor vehicle shall be driven unless the tailgate, tailboard, tarpaulins, doors, all equipment and rigging used in the operation of said vehicle, and all means of fastening the load, are securely in place.

49 C.F.R. 193.9 (a) *Distribution and securing of load.* The load on every motor vehicle transporting property shall be properly distributed, and if necessary, secured, in order to prevent unsafe shifting of the load or unsafe operation of the vehicle.

(b) *Fastenings secure.* No motor vehicle shall be driven unless the driver thereof shall have satisfied himself that the tailboard or tailgate, tarpaulins, spare tires, and all means of fastening the load are securely in place.

necessary for such installation at the rate of one dollar and fifty cents ($1.50) per hour or fraction thereof, for each man. When materials are furnished by the carrier, charge therefor will be as per tariffs lawfully on file with the Interstate Commerce Commission or State regulatory body having jurisdiction.

In addition to these regulatory provisions, obligations were imposed upon the carrier by 49 U.S.C. §20(11), which is made applicable to motor carriers by 49 U.S.C. §319. This provides that any common carrier receiving property for interstate transportation shall issue a bill of lading therefor and shall be liable to the holder for any loss, damage or injury to the property caused by it and that no contract shall exempt the carrier from the liability imposed.

In our opinion the provisions of the statutes and regulations referred to as well as the provisions of the tariff formed part of the contract between the shipper and the carrier in this case. In Virginia, where the contract was made, and generally in other jurisdictions throughout the country, it is settled that relevant statutes and regulations existing at the time a contract is made become a part of it and must be read into it just as if they were expressly referred to or incorporated in its terms.* Hence it is plain that Mason & Dixon assumed the direct and specific obligation to General Electric to secure the cargo safely so that it would not shift during the movement, and became liable for any loss caused by its failure to carry out its promises, unless it is excused by the concurring negligence of General Electric. It should be borne in mind, in this connection, that the transportation of the goods during which the loss occurred lay entirely in the hands of the

* As to the inclusion of public tariffs and classifications in the contract between shipper and carrier, see *Louisville & N. R. Co. v. Chatters*, 279 U. S. 320, 331; 49 S. Ct. 327, 73 L. Ed. 711, 719 (1929); *Eastern Motor Express v. Maschemier, Jr., Inc.*, 247 F. 2d 826, 828 (2 Cir. 1957); *Fawley Motor Lines v. Cavalier Poultry Corp.*, 235 F. 2d 416, 419 (4th Cir. 1956); *Loveless Mfg. Co. v. Roadway Exp.*, 104 F. Supp. 809, 812 (N. D. Okla. 1952).

As to the inclusion in the contract of regulations of the Interstate Commerce Commission, see *Atcheson T. & S. F. Ry. Co. v. Scarlett*, 300 U. S. 471, 474, 57 S. Ct. 541, 81 L. Ed. 748 (1937).

As to the general rule in Virginia and in the Federal courts, see *Maxey v. American Cas. Co. of Reading, Pa.*, 180 Va. 285, 290, 23 S. E. 2d 221 (1942); *Merchants' Bank v. Ballou*, 98 Va. 112, 153, 26 S. E. 421 (1896); *Northern Pacific Ry. Co. v. Wall*, 241 U. S. 87, 91-92, 36 S. Ct. 493, 60 L. Ed. 905 (1916); *East Texas Motor Freight Lines v. United States*, 5 Cir., 239 F. 2d 417, 418; 12 Am. Jur., Contracts, §240, p. 799.

carrier and that the initial failure of the shipper to load the goods properly in no way prevented the carrier from carrying out its own statutory contractual duties. Moreover, the requirement of the tariff that the shipper bear the burden of loading heavy or bulky goods was obviously inserted as part of the consideration moving from the shipper for the carriage of the goods at the published rate. It was not intended to shift to the shipper a duty ordinarily imposed upon the carrier. This becomes the more clear from the provision of the tariff that the carrier itself might do the work upon payment by the shipper of the expense involved. Clearly the carrier was not excused from carrying out its primary obligation to the shipper to make certain that the cargo delivered to it unharmed was not sent out over the public roads in a dangerous condition.

Bearing these circumstances in mind, the claim of the shipper to be indemnified for the loss caused by the carrier's default takes on a different aspect. The Federal courts on a number of occasions have given consideration to a similar question in the analogous situation of a shipowner who has been called upon to pay damages to a longshoreman for injuries received in the negligent performance by the stevedoring company, his employer, of its contract for the loading or unloading of the vessel. Liability of the stevedoring company to the longshoreman was limited to compensation under the Longshoreman's and Harbor Workers' Act while liability of the shipowner was based on the unseaworthy condition of the ship or some act of negligence on the part of the shipowner in furnishing unsafe equipment or a safe place to work. In these cases the question has arisen as to whether the default of the shipowner deprived him of the right to be indemnified by the stevedoring company because of its failure to comply with its contract. Thus, in *Ryan Co.* v. *Pan Atlantic Corp.*, 350 U.S. 124, a stevedoring company

was under contract with a shipowner to perform all the stevedoring operations required by the shipowner in its coastwise service; and the shipowner was held liable to a longshoreman for injuries suffered by him while unloading the ship at Brooklyn, New York, which were caused by the unsafe stowage of the cargo at an earlier port by the stevedoring contractor under the supervision of the officers of the ship who had authority to reject unsafe stowage; but it was held that the shipowner, notwithstanding its participation in the unsafe stowage, was entitled to indemnity from the stevedoring contractor. This conclusion was reached although there was no express agreement of indemnity. The Court said (pp. 133, 134):

> "The shipowner here holds petitioner's uncontroverted agreement to perform all of the shipowner's stevedoring operations at the time and place where the cargo in question was loaded. That agreement necessarily includes petitioner's obligation not only to stow the pulp rolls, but to stow them properly and safely. Competency and safety of stowage are inescapable elements of the service undertaken. This obligation is not a quasi-contractual obligation implied in law or arising out of a noncontractual relationship. It is of the essence of petitioner's stevedoring contract. It is petitioner's warranty of workmanlike service that is comparable to a manufacturer's warranty of the soundness of its manufactured product. The shipowner's action is not changed from one for a breach of contract to one for a tort simply because recovery may turn upon the standard of the performance of petitioner's stevedoring service.
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> * * * * *
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> "Petitioner suggests that, because the shipowner had an obligation to supervise the stowage and had a right to reject unsafe stowage of the cargo and did not do so, it now should be barred from recovery from

the stevedoring contractor of any damage caused by that contractor's uncorrected failure to stow the rolls 'in a reasonably safe manner.' Accepting the facts and obligations as above stated, the shipowner's present claim against the contractor should not thereby be defeated. Whatever may have been the respective obligations of the stevedoring contractor and of the shipowner to the injured longshoreman for proper stowage of the cargo, it is clear that, as between themselves, the contractor, as the warrantor of its own services, cannot use the shipowner's failure to discover and correct the contractor's own breach of warranty as a defense. Respondent's failure to discover and correct petitioner's own breach of contract cannot here excuse that breach."

This holding was approved and followed in *Weyerhaeuser S. S. Co. v. Nacirema Operating Co.*, 355 U. S. 563, 2 L.Ed. 2d 491; 78 S.Ct. 438 (1958), where a longshoreman recovered damages from the shipowner for injuries caused by the fall of timber from an insecure structure on the deck of the ship, and was held that the careless maintenance of the structure on the part of the ship did not preclude the submission to the jury of its claim to indemnity from the stevedoring contractor based on the latter's careless use of the structure in the unloading operation. It was pointed out (p. 568) that the duties owing by the shipowner to the longshoreman were not identical with those owed by the shipowner to the stevedoring contractor. Again, in *Crumady v. The J. H. Fisser*, 358 U.S. 423, 3 L.Ed. 413, 79 S.Ct. 445 (1959), indemnity was allowed a shipowner against a stevedoring contractor where injuries were caused by unsafe equipment furnished by the ship and used by the contractor. We applied the same rule in our decisions in *Calmar Steamship Corp. v. Nacirema Operating Co.*, 266 F.2d 79 (1951), and in *American Export Lines, Inc. v. Revel*,

266 F.2d 82 (1959), in both of which it was held that a shipowner was liable to an injured longshoreman for injuries suffered in the use of unseaworthy equipment furnished by the ship, but that the shipowner was nevertheless entitled to indemnity from the stevedoring contractor because the latter negligently used the equipment in the performance of its contract.* It is plain that the default of the shipper in the pending case was no greater than that of the shipowner in the cited cases.

We reach the conclusion that the contract of Mason & Dixon for the carriage of the goods embraced the liability to indemnify General Electric in case it suffered loss occasioned by the neglect of the carrier; and there remains only for consideration the additional contention of Mason & Dixon that the application of that rule is barred in the pending case by the Workmen's Compensation Act of Tennessee (Tennessee Code §50.908)†, which provides that the rights and remedies granted to an employer thereunder on account of personal injury for accidents shall exclude all other rights and remedies of the employee at common law or otherwise on account of such injury. Our attention is called to a number of cases in which somewhat similar language of the workmen's compensation act of a

* Prior to the development of the theory in these cases that an agreement to indemnify is of the essence of a contract in which one undertakes to perform services for another, it had been held in this and other courts that when one who is secondarily liable is called in to respond in damages to an injured party he may recover the amount paid from the person primarily liable. See our decision in *United States* v. *Savage Truck Line, Inc.*, 209 F.2d 442 (1953) where, under circumstances very similar to those in the case at bar, we held that in a motor carrier contract the primary contractual duty as to safe loading is upon the carrier and that the failure to perform the duty is a weighty factor in identifying the principal offender and saddling him with the liability of indemnitor, notwithstanding the initial negligence of the shipper in loading the goods of which the carrier had notice. See also *American District Telegraph Co.* v. *Kittelson*, (8 Cir., 1950) 179 F.2d 946, 952; *Orlove* v. *Philippines Airlines*, (2 Cir., 1958) 257 F.2d 384, 388, cert. den. 358 U.S. 900, 3 L.Ed.2d 230, 79 S.Ct. 230; *Hunsucker* v. *High Point Bending & Chair Co.*, 237 N.C. 550, 75 S.E.2d 708 (1953). In *Weyerhaeuser S.S. Co.* v. *Nacirema Co.*, 355 U.S. 563 at 566, it was pointed out that, in the area of contractual indemnity, an application of the theories of active or passive as well as primary or secondary negligence is inappropriate.

† See Note, 42 Va. L. R. 959, Contribution and Indemnity Under the Effect of Workmen's Compensation Acts (1956).

state has been held a bar to a suit against an employer for indemnity by a third person who has been required to pay damages for injuries to an employee, although the injuries were caused primarily by the neglect of the employer and only secondarily by negligence of a third person. Thus, in *Hunsucker v. Chair Co.*, 237 N.C. 559, 75 S.E. 2d 768 (1953), where the authorities were carefully reviewed, it was held that the Workmen's Compensation Act of North Carolina abrogated both the statutory right of a negligent third party to claim contribution from a negligent employer in equal fault and the common-law right of a passively negligent third party to demand indemnity from an actively negligent employer. See also *Public Service & Gas Co. v. Waldroup*, 38 N.J. Super. [illegible], 119 A.2d 172 (1955), and *Slattery v. Marra Bros.*, (2 Cir., 1951), 186 F.2d 134, 139, where the same conclusion was reached in respect to the Workmen's Compensation Act of New Jersey; *Peak Drilling Co. v. Halliburton Oil Well Cement Co.*, (10 Cir., 1954) 215 F.2d 368, construing the law of Oklahoma; *Crawford v. Pope & Talbot, Inc.*, (3 Cir., 1953), 206 F.2d 784, with respect to the Longshoremen's and Harbor Workers' Compensation Act. It is noticeable, however, that in all of these cases upon which Mason & Dixon relies in the pending suit the courts were careful to point out that the compensation act in question did not bar indemnity when there existed a contractual relationship between the parties whose negligence combined to cause the employee's injuries. Thus it was pointed out in *Hunsucker v. Chair Co.*, 237 N.C. 559 at 567 and 568, 75 S.E. 2d 768 (1953), that in the cases in which indemnity to third parties was allowed, the negligent employer was under express contract with the third party or bore some special relationship to him other than that arising out of participation in the joint wrong to the injured employee. This distinction was noted also in *Public Service & Gas Co. v. Waldroup*,

38 N.J. Super. 419, 119 A.2d 172 at 181, and *Slattery* v. *Marra Bros.*, (2 Cir., 1951), 186 F.2d at 139, and *Peak Drilling Co.* v. *Halliburton Oil Well Cement Co.*, (10 Cir., 1954), 215 F.2d at 371, and in *Crawford* v. *Pope & Talbot, Inc.*, (3 Cir., 1953), 206 F.2d 784 at 792.

This distinction was the foundation of the holding in *Ryan Co.* v. *Pan-Atlantic Corp.*, 350 U.S. 124, 100 L.Ed. 133, 76 S.Ct. 232, from which we have quoted at length, that §5 of the Longshoremen's and Harbor Workers' Act does not preclude the assertion by the shipowner of the stevedore's contractual liability to him, although the stevedore is the employer of the injured worker. It was pointed out (p. 130) that although the Longshoremen's and Harbor Workers' Act protects employers from the claims of employees and those claiming under them, it nowhere excludes the right of a third person to insure himself against liability to the employee either by a bond of indemnity or by an agreement of the employer to save him harmless, which is the essence of a contract wherein one undertakes to perform services for another. In that case the stevedoring contractor for the loading of the vessel was held to embrace such a warranty. In the pending case the agreement of the carrier to see that the equipment was properly loaded before transporting it likewise involved an agreement to indemnify the shipper in case of loss. Similar conclusions had been reached by the courts in cases prior to Ryan. See *Burris* v. *American Chickle Co.*, (2 Cir., 1941), 120 F.2d 218; *Rich* v. *United States*, (2 Cir., 1949), 177 F.2d 688; *Crawford* v. *Pope & Talbot, Inc.*, (3 Cir., 1953), 206 F.2d 784, 792; *Westchester L. Co.* v. *Westchester C.S.E. Corp.*, 278 N.Y. 175, 15 N.E. 2d 567 (1938); *Whitemarsh* v. *Dura Stone Co.*, (D.C. R.I., 1954), 122 F. Supp. 806.

Much reliance was placed in the trial court in the pending case on the decision of *Trammell* v. *Appalachian*

Elec. Cooperative, (E. D. Tenn., 1955), 135 F. Supp. 512, which was described as the only case interpreting the exclusive liability section of the Tennessee Workmen's Compensation Act. In that case the question now under consideration was broached but not decided. The case involved an action by the administrator of a deceased employee against the Cooperative on account of the death of the employee of a contractor who had agreed to undertake certain operations on behalf of the Cooperative. A third-party action was filed by the Cooperative against the contractor for indemnity but this was dismissed by the court on the ground that the third-party action would lie only if it was based upon contract, the court finding that no such contract existed between the parties. We are told that the *Trammell* decision was followed in another unreported case in the United States District Court for the Eastern District of Tennessee which is now on appeal. But it does not appear that in either of these cases the court decided what was described in *Trammell* as the more interesting question—whether in Tennessee an employer may assume liability to indemnify a third person who has injured an employee covered by the compensation act of the state. Furthermore, *Trammell* was decided before *Ryan*. We have no reason therefore to suppose that Tennessee will not follow the rule so well established in other jurisdictions which allows indemnity in cases of contract between the employer and the third person; and we do not reach the constitutional question whether the workmen's compensation act of a state may be so construed as to nullify or modify the obligations of a common carrier to a shipper which have been assumed in accordance with acts of Congress passed under the commerce clause of the Federal Constitution.

The judgment of the District Court is accordingly reversed insofar as it dismisses the third-party action of General Electric against Mason & Dixon and the case is

remanded with directions to enter a judgment against Mason & Dixon in favor of General Electric for the amount of the judgment entered against General Electric in accordance with jury's verdict. In other respects, the judgment of the District Court is affirmed.

Reversed in part,
Affirmed in part,
and Remanded.

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 7878.

General Electric Company,
Defendant and Third-Party Plaintiff,
Appellant,

versus

Kelly C. Moretz, Plaintiff, and
The Mason & Dixon Lines, Inc.,
Third-Party Defendant,
Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF VIRGINIA, AT ROANOKE.
ROBY C. THOMPSON, DISTRICT JUDGE.

ON PETITION OF APPELLEE
THE MASON & DIXON LINES, INC.,
FOR REHEARING.

(Petition for Rehearing filed October 12, 1959.
Denied November 25, 1959.)

Submitted to SOBELOFF, Chief Judge, SOPER, Circuit Judge, and THOMSEN, District Judge.

John H. Doughty and John H. Locke (Gentry, Locke & Rakes, and Hodges, Doughty & Carson on brief) for Appellant; A. Linwood Holton, Jr., (Eggleston and Holton; Todd & Todd, and Dodson & Dodson on brief) for Appellee Kelly C. Moretz; John H. Thornton, Jr., and Duke Duvall (Woods, Rogers, Muse and Walker on brief) for Appellee The Mason & Dixon Lines, Inc.; and Arthur E. Smith and Evans B. Jessee on brief for Liberty Mutual Insurance Company.

PER CURIAM:

As will appear from the opinion heretofore filed in this case, F.2d , Mason & Dixon, a carrier of certain electrical equipment in interstate commerce, was held liable to indemnify General Electric, the shipper, for damages the shipper was held liable to pay to Kelly C. Moretz, the driver of Mason & Dixon's vehicle, for injuries suffered by him when the load because of improper stowage suddenly shifted in rounding a turn in the road, causing the vehicle to overturn. The suit was brought in the first instance by the driver against the shipper and the latter filed a third-party complaint against the carrier. The shipper was held liable because it negligently loaded the vehicle in the first place, but the carrier was held liable to indemnify the shipper because the evidence showed that the carrier took over the vehicle and transported it on the public highway with knowledge that the load had been improperly secured and thereby failed to perform its duty in accordance with its contract with the shipper and the regulations of the Interstate Commerce Commission.

After the opinion was filed, a motion for rehearing was filed by the carrier based in part on the ground that it had been deprived of its right to a jury trial on the issue of its liability to indemnify. The record does not support the

contention. The case was first submitted to the jury on the question of the primary negligence of the shipper and a verdict against it in favor of the driver was rendered. Thereupon, the judge submitted to the jury a special interrogatory as to whether the carrier was guilty of negligence which proximately contributed to the accident and the resulting injuries to the driver, and the jury answered the interrogatory in the affirmative. The uncontradicted evidence showed not only that the load was improperly secured but, also, that the carrier had knowledge of it when it sent the vehicle out on the road. Upon these facts we reached the conclusion of law that the carrier was obliged to indemnify the shipper in analogy with decisions of the United States Supreme Court holding a stevedoring company liable to indemnify a shipowner for damages which the latter has been required to pay to a longshoreman for injuries due to the unsafe stowage of the cargo by the stevedoring company.

The carrier now complains that it should have been left to the jury in the pending case to decide not only whether the carrier was negligent in respect to the stowage of the goods but also whether the negligent conduct of the shipper was such as to preclude indemnity in this case. It bases its contention on the decision in *Weyerhaeuser S.S. Co. v. Nacirema Operating Co.*, 355 U.S. 563, 567, where it was said that the evidence bearing on certain issues of fact relating to the liability of a stevedoring company to a shipowner for indemnity in a third-party proceeding should have been submitted to the jury "under appropriate instructions". The plaintiff in that case was a longshoreman who was engaged in unloading a ship in Boston and was struck by a piece of wood which fell upon him in the hold of the vessel from a temporary winch shelter on the deck. The shelter had been built by the stevedoring company a short time before when it was unloading a part of the cargo in New York. The shelter should have

been removed by the crew of the vessel while enroute to Boston but, instead, it was left in place when the ship was turned over to the stevedoring company in Boston to complete the unloading. It was this failure on the part of the shipowner to perform the nondelegable duty to furnish adequate equipment which justified the verdict against the shipowner. After this verdict was rendered by the jury against the shipowner the judge directed a verdict against the stevedore. This action was held to be erroneous. The court said that all fact issues involved in the third-party action against the stevedore should have been submitted to the jury after the verdict in the main case, since the duties owing by the shipowner to the longshoreman were not identical with those owned by the stevedoring company to the longshoreman. The court pointed out that the general verdict against the shipowner might have been based on the failure of the ship to remove the shelter when the ship left New York, or a failure to warn the stevedore of the dangerous condition of the shelter, or upon the failure of the stevedore to inspect the shelter and correct the unsafe condition after the ship arrived at Boston, and that in the last contingency, at least, recovery of indemnity would not be prevented. The holding of the Supreme Court was that in the absence of a decision on these points, the question of the liability of the stevedore to indemnify could not be determined and hence the necessity arose to submit the fact issues to the jury under proper instructions. There is, however, no intimation in the opinion that it should have been left to the jury to determine the legal liability of the defendant in the third-party action after the facts had been ascertained. Obviously this was a question of law for the judge.

In the pending case the admonition of the *Weyerhaeuser* case was followed. After the verdict in the main case was rendered against the shipper, a separate issue as to the negligence of the carrier was submitted to the jury

and found against it. That issue was directed to the same point of fact in both the original and the third-party suit, that is, whether the defendant had caused the shipment to be transported on the road with knowledge that it was in an insecure condition and without any effort to correct it. In each instance, the uncontradicted evidence established the default and it then became the duty of the court to determine the legal obligations of the parties. The reasons for the ultimate conclusion of law that the shipper was entitled to indemnity from the carrier in this case are set forth in our main opinion.

The motion for rehearing is denied.

Rehearing Denied.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 619

THE MASON & DIXON LINES, INC.
Petitioner

v.

GENERAL ELECTRIC COMPANY
Respondent

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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IN THE

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the United States District Court for the Western District of Virginia is reported in 170 F. Supp. 698. The opinion of the United States Court of Appeals for the Fourth Circuit is reported in 270 F. (2d) 780.

JURISDICTION

Judgment of the Court of Appeals was entered on September 16, 1959. The Petition for a Writ of Certiorari was filed on December 30, 1959. The jurisdiction of this Court is invoked under 28 U. S. C. Sec. 1254. (1).

STATUTES AND REGULATIONS INVOLVED

1. 49 U. S. C. 319 is set forth in the Appendix hereto at page A-1.

2. 49 U. S. C. 20 (11) is set forth in the Appendix hereto at page A-1.

3. 49 U. S. C. 316 (b) is set forth in the Appendix hereto at page A-2.

4. 49 C. F. R. 192.9 (a) and (b) and 49 C. F. R. 193.9 (a) and (b) are set forth in the Appendix hereto at page A-3.

5. Rule 21 and Rule 22 of National Motor Freight Classification No. A-3 M. F. - I. C. C. No. 8, published and promulgated by the American Trucking Association are set out in the Appendix hereto at page A-3.

QUESTIONS PRESENTED

1. The real question presented in this case is, WHO, as between a shipper and a motor vehicle common carrier, has the duty to see that the load is safe for transportation.

2. Secondary questions raised involve matters of procedure and legal principles of indemnity.

STATEMENT OF CASE

This is a common law negligence action involving questions of indemnity which was instituted by Kelly C. Moretz in the United States District Court for the Western District of Virginia.

General Electric Company manufactures electrical equipment which it ships to customers all over the United States. The Mason & Dixon Lines, Inc. is a motor vehicle common carrier. Kelly C. Moretz was an employee of The Mason & Dixon Lines, Inc., an "over-the-

road driver," in the scope of his employment, when a tractor-trailer, loaded with General Electric Company's products, which he was driving, turned over on February 22, 1957.

Claiming that General Electric Company negligently loaded the trailer and failed to brace the cargo, Kelly C. Moretz instituted suit against General Electric Company. Shortly thereafter, General Electric Company filed a Third-Party Complaint against The Mason & Dixon Lines, Inc. claiming indemnity from said Mason & Dixon Lines, Inc. in the event it should be held liable to Moretz. A jury trial was held in the United States District Court for the Western District of Virginia with *all parties* participating throughout. The Trial Judge charged the jury as to respective rights and duties and after the verdict in favor of Kelly C. Moretz against General Electric Company, submitted an Interrogatory to the jury covering the duties of The Mason & Dixon Lines, Inc. The jury found that The Mason & Dixon Lines, Inc. was guilty of a breach of duty which proximately contributed to the accident.

The Trial Judge, after having had the various factual issues determined by the jury, took the question of law involved in the indemnity issue under consideration. After mature consideration the Trial Court held that it could not spell out any contractual duty on The Mason & Dixon Lines, Inc. to load and transport the cargo safely and that the Tennessee Workmen's Compensation Act was a bar to General Electric Company's claim for indemnity against The Mason & Dixon Lines, Inc.

An appeal was taken to the United States Court of Appeals for the Fourth Circuit by General Electric Company and it reversed the District Court on these points, holding that the contract of The Mason & Dixon Lines, Inc. for the carriage of the goods embraced the liability to indemnify General Electric Company, in case it suf-

fered loss occasioned by the neglect of the carrier and that the Tennessee Workmen's Compensation Act did not bar this right to indemnity. The Fourth Circuit held that it was plain that The Mason & Dixon Lines, Inc. assumed the direct and specific obligation to General Electric Company to secure the cargo safely so that it did not shift during the movement, and became liable for any loss caused by its failure to carry out its promises, unless it was excused by some action on behalf of the General Electric Company. It stated in part:

> "It should be borne in mind, in this connection, that the transportation of the goods during which the loss occurred lay entirely in the hands of the carrier and that the initial failure of the shipper to load the goods properly in no way prevented the carrier from carrying out its own statutory contractual duties. Moreover, the requirement of the tariff that the shipper bear the burden of loading heavy or bulky goods was specifically inserted as part of the consideration moving from the shipper for the carriage of the goods at the published rate. It was not intended to shift to the shipper a duty ordinarily imposed upon the carrier. This becomes the more clear from the provision of the tariff that the carrier itself might do the work upon payment by the shipper of the expenses involved. Clearly the carrier was not excused from carrying out its primary obligation to the shipper to make certain that the cargo delivered to it unharmed was not sent out over the public roads in a dangerous condition."

There is no where in this case any finding or holding that General Electric Company had a written contractual obligation to load and brace the equipment in question. It did undertake to load it as a measure of convenience and necess but as between General Electric Company and The Mason & Dixon Lines the ultimate

duty to brace, if bracing was needed, always rested on The Mason & Dixon Lines, Inc. (See testimony Nicholas F. Behme, Jr., Chairman of National Classification Board of the Motor Carrier Industry, R. pgs. 175, 176, 177, 178.) Further, General Electric Company, while it had had experience with packing and crating, was certainly not an expert with regard to bracing an over-the-road shipment. The Mason & Dixon Lines, Inc. was the transportation expert in this case.

We cannot agree with Petitioner's contention on page 7 of its Petition that the Court of Appeals made a factual determination on the question of indemnity. The Court of Appeals merely applied proper law to the factual determination which had been made by the jury. The evidence was uncontradicted that The Mason & Dixon Lines, Inc. had caused the shipment to be transported on the road with actual knowledge that it was in an insecure condition and without any effort to correct it. Further, the uncontradicted facts showed that General Electric Company was guilty of no breach of duty toward The Mason & Dixon Lines, Inc.

ARGUMENT

POINT I

GENERAL ELECTRIC COMPANY WAS PLAINLY ENTITLED TO INDEMNITY IN THIS CASE.

The Petitioner in this case seeks to bring before this Court for review a decision which, in holding Petitioner liable to indemnify the shipper for the claim of an injured plaintiff, turns upon the application of well established principles of law under the facts and circumstances of this case. The decision of the Court of Appeals reaches results which are clearly correct and just.

It conforms with all opinions of this Court on the questions involved. No conflicts exist, and no novel variations require further consideration or reiteration by this Court of the applicable general principles.

When you brush away all the surplusage with regard to the present issue of indemnity, the only thing that is left is, as between The Mason & Dixon Lines, Inc. and General Electric Company, *who* had the duty to brace and see that the load was safe and secure for transportation over the highways. We submit that The Mason & Dixon Lines, Inc., a motor vehicle common carrier and a transportation expert, had the non-delegable duty to see that the load was safe and secure for transportation. *United States* v. *Savage Truck Line, Inc.*, 209 F. (2d) 442 (C. C. A. 4th Cir. 1953); 44 A. L. R. (2d) 984, cert. den. 347 U. S. 952, 98 L. Ed. 1098, 74 S. Ct. 677 (1954). The uncontradicted evidence shows that it breached this duty and it even admits this. *Pet. pg. 7, §(7)*. However, it is now attempting to confuse the issue and contend that General Electric Company's duty to it was the same as it was to the injured plaintiff. This is simply not correct because under all the applicable rules and regulations the only duty that General Electric Company owed to The Mason & Dixon Lines, Inc. was to pay for the transportation of the goods.

Of course, when General Electric Company undertook to load the cargo it had a duty to the truck driver and other individuals to see that the truck was properly loaded. However, as between General Electric Company and The Mason & Dixon Lines, Inc., this duty rested on The Mason & Dixon Lines, Inc. Therefore, there was nothing in this case for a jury to decide on the question of General Electric Company's action. As this Court pointed out in *Ryan Stevedoring Company* v. *Pan-Atlantic S. S. Corp.*, 350 U. S. 124, 100 L. Ed. 133, 76 S. Ct. 232 (1956), the indemnity issue turns on the respective

rights and duties of the parties to each other, not to the original plaintiff.

We do not have here a situation in which the carrier's breach of duty brought about the injuries by operating upon a prior condition caused by the shipper's negligence, *which condition was unknown to the carrier*. Cf. *Hagans* v. *Farrell Lines*, 237 F. (2d) 477 (C. C. A. 3rd 1956), which decision unduly limits the scope of *Ryan, supra*, and was certainly impliedly overruled by this Court in 1959. *Crumady* v. *The J. H. Fisser*, 358 U. S. 423, 3 L. Ed. (2d) 413, 79 S. Ct. 445 (1959). Here, in the instant case, the motor vehicle common carrier was fully informed of the facts that the load needed bracing. It admits that it was cognizant of the possible consequences of the shipper's negligence. It further admits that it intended to brace the load in question. However, in the face of all this, and with actual knowledge thereof, The Mason & Dixon Lines, Inc. let the load go out onto the highway and therefore put into operation an immediately dangerous force. Clearly it was The Mason & Dixon Lines's breach of duty that created the danger and made it an active condition with immediately foreseeable consequences of personal injury. There was nothing General Electric Company did or did not do, as between it and The Mason & Dixon Lines, which could be pointed to as a breach of duty owed by General Electric Company to The Mason & Dixon Lines, Inc.

Even if it is argued that General Electric Company's failure to brace was a breach of duty by it, the motor vehicle common carrier was fully aware of this condition prior to plaintiff's injury and nonetheless willingly proceeded to accept the shipment and send it out on the highway, despite the known dangerous condition. Therefore, even on Petitioner's own theory The Mason & Dixon Lines, Inc. would be held to have waived the breach. *Restatement, Contracts* §§ 294, 297 (1932);

American President Lines, Ltd. v. *The Marine Terminals Corp.*, 234 F. (2d) 753 (C. C. A. 9th Cir. 1956), cert. den. 352 U. S. 926, 1 L. Ed. (2d) 161, 77 S. Ct. 222 (1956).

It must be remembered that there was no conflict in the evidence in this case on the question of indemnity. Petitioner does not even suggest any conflict or disputed factual issues. However, Petitioner attempts to raise a constitutional question by contending that it was deprived of its right to a jury trial. In this connection Petitioner cites the case of *Weyerhaeuser S. S. Co.* v. *Nacirema Operating Co.*, 355 U. S. 563, 2 L. Ed. (2d) 491, 78 S. Ct. 438 (1958).

Petitioner has not been deprived of its constitutional right to a jury trial in the instant case and *Weyerhaeuser* is no basis for such a contention here. In the *Weyerhaeuser* case none of the facts on the indemnity issue were determined at the time of trial. Here, the uncontradicted evidence and the jury's verdict determined all factual issues on the question of indemnity. Certainly, neither *Weyerhaeuser* nor the Seventh Amendment to the Constitution requires a Federal Judge to leave it to the jury to determine the legal liability of a third-party defendant after the facts have all been ascertained. Obviously, this is a question of law for the Judge. See *Galloway* v. *United States*, 319 U. S. 372, 87 L. Ed. 1458, 63 S. Ct. 1077 (1943).

POINT II

PETITIONER SHOULD NOT NOW BE ALLOWED TO RAISE THE QUESTION OF ITS RIGHT TO A JURY TRIAL FOR THE FIRST TIME.

Although it is clear from what has been said heretofore that the Petitioner has not been denied its constitutional right to a jury trial it is interesting to note that the

first time Petitioner raised this question, or insisted on it, was in its Petition for a Rehearing in the United States Court of Appeals for the Fourth Circuit. Petitioner made no requests for a jury trial in the District Court, nor was there any objection to the jury trial afforded it. Petitioner, through its counsel, participated in all pre-trial procedures, made an opening statement to the jury, was permitted to examine and cross-examine witnesses, was permitted to offer evidence, and was permitted to present argument to the jury. Also, although the District Judge requested proposed charges and Interrogatories Petitioner offered none. The Petitioner in this case made no attempt in the District Court to have the issue of General Electric Company's conduct submitted to a jury.

The law has always been, and this Court has consistently held, that the failure to request a given issue be submitted to a jury constitutes a waiver of any right to such submission. *Pennsylvania Railroad Co.* v. *Minds*, 250 U. S. 368, 63 L. Ed. 1039, 39 S. Ct. 531 (1919); *United States* v. *Atkinson*, 297 U. S. 159, 80 L. Ed. 557, 56, S. Ct. 392 (1936). Certainly a prerequisite for raising such failure on appeal is notice to the Trial Court by way of an objection. *F. R. C. P.* 49, 51. No request was made to have this issue submitted and no objection was made in the Trial Court in this case. Therefore, we earnestly submit that Petitioner has waived its right to raise this issue and that same cannot be now raised for the first time on appeal.

POINT III

THE DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT IS NOT IN CONFLICT WITH DECISIONS FROM ANY OTHER CIRCUITS, BUT IS CLEARLY PROPER AND CORRECT AND IN KEEPING WITH THE LAW LAID DOWN BY THIS COURT.

Petitioner asserts that the instant case is most unusual. However, such assertion is simply not correct. Approximately five years ago this Honorable Court approved an identical holding in a case practically "on all fours" with the instant case. *United States v. Savage Truck Line, Inc.*, 209 F. (2d) 442 (C. C. A. 4th Cir. 1953), 44 A. L. R. (2d) 984, cert. den. 347 U. S. 952, 98 L. Ed. 1098, 74 S. Ct. 677 (1954). Also, less than four months ago this Honorable Court approved the application of principles of indemnity identical to those presented here. *Calmar S. S. Corp. v. Nacirema Operating Co.*, 266 F. (2d) 79 (C. C. A. 4th Cir. 1959), cert. den. No. 99, 4 L. Ed. (2d) 62 (1959).

Again, in *Crumady* v. *The J. H. Fisser, supra*, indemnity over was approved where injuries were caused by unsafe equipment furnished by the ship and used by the contractor.

The case of *Hagans* v. *Farrell Lines*, 237 F. (2d) 477 (3rd Cir. 1956) presents no conflict with the instant case. In the *Hagans* case the injuries were found to be the result of the shipowners' own breach of contract which violated its duty to the stevedoring company as well as the longshoreman. This is not true in the instant case because the duties of General Electric Company to Kelly C. Moretz as to making the cargo safe and secure for transportation do not likewise flow to The Mason & Dixon Lines, Inc. under the facts and law applicable

herein. Further, it would certainly appear as indicated heretofore that the *Haggans* case has been impliedly overruled by this Court with its recent decision in *Grumady v. The J. H. Fisser, supra.*

The case of *Irvin v. General Electric Company*, Civil No. 1275, E. D. Tenn., October 9, 1958 was one in which the District Court dismissed the Third-Party Complaint on the ground that it was not timely filed and on the further ground that the Tennessee Workmen's Compensation Act barred any claim to indemnity. Petitioner has now abandoned this latter contention in the instant case and therefore there can certainly be no conflict between this case and the *Irvin* case. This case follows in the footsteps of many others from various circuits in addition to those cited heretofore. See *American Export Lines, Inc., v. Revel*, 266 F. (2d) 82 (C. C. A. 4th Cir. 1959); *Burris v. American Chicle Co.*, 120 F. (2d) 218 (C. C. A. 2nd Cir. 1941); *Crawford v. Pope & Talbott, Inc.*, 206 F. (2d) 784 (C. C. A. 3rd Cir. 1953); *United States v. Arrow Stevedoring Co.*, 175 F. (2d) 329 (C. C. A. 9th Cir. 1949); *Lundberg v. Prudential S. S. Corp.*, 102 F. Supp. 115 (D. C. N. Y. 1951); *Whitmarsh v. Durastone Co.*, 122 F. Supp. 806 (D. C. R. I. 1954); *Orlove v. Philippine Air Lines*, 257 F. (2d) 384 (C. C. A. 2nd Cir. 1958); *Rich v. United States*, 177 F. (2d) 688 (C. C. A. 2nd Cir. 1949); and *American District Telegraph Co. v. Kittleson, et al*, 179 F. (2d) 946 (C. C. A. 8th Cir. 1950).

This case presents no novel or unusual circumstances which would be of wide public or governmental interest. It is simply a common law negligence action.

The consequences will affect only the parties in this particular litigation. There is no departure from precedent and the decision of the United States Court of Appeals for the Fourth Circuit Court is eminently fair and just.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,
GENERAL ELECTRIC COMPANY
BY J. H. DOUGHTY and
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49 U. S. C. 319 provides:

> The provisions of section 20 (11) and (12) of this title, together with such other provisions of chapter 1 of this title (including penalties) as may be necessary for the enforcement of such provisions, shall apply with respect to common carriers by motor vehicle with like force and effect as in the case of those persons to which such provisions are specifically applicable.

49 U. S. C. 20 (11) provides, in pertinent part:

> Any common carrier, railroad, or transportation company subject to the provisions of this chapter receiving property for transportation from a point in one State or Territory or the District of Columbia to a point in another State, Territory, District of Columbia, or from any point in the United States to a point in an adjacent foreign country shall issue a receipt or bill of lading therefor, and shall be liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it or by any common carrier, railroad, or transportation company to which such property may be delivered or over whose line or lines such property may pass within the United States or within an adjacent foreign country when transported on a through bill of lading, and no contract, receipt, rule, regulation, or other limitation of any character whatsoever shall exempt such common carrier, railroad, or transportation company from the liability hereby imposed; and any such common carrier, railroad, or transportation company so receiving property for transportation from a point in one State, Territory, or the District of Columbia to a point in another State or Territory, or from a point in a State or Territory to a point in the District of Columbia, or from any point in the United

States to a point in an adjacent foreign country, or for transportation wholly within a Territory, or any common carrier, railroad, or transportation company delivering said property so received and transported shall be liable to the lawful holder of said receipt or bill of lading or to any party entitled to recover thereon, whether such receipt or bill of lading has been issued or not, for the full actual loss, damage, or injury to such property caused by it or by any such common carrier, railroad, or transportation company to which such property may be delivered or over whose line or lines such property may pass within the United States or within an adjacent foreign country when transported on a through bill of lading, notwithstanding any limitation of liability or limitation of the amount of recovery or representation or agreement as to value in any such receipt or bill of lading, or in any contract, rule, regulation, or in any tariff filed with the Interstate Commerce Commission; and any such limitation, without respect to the manner or form in which it is sought to be made is declared to be unlawful and void***

49 U. S. C. 316 (b) provides:

(b) It shall be the duty of every common carrier of property by motor vehicle to provide safe and adequate service, equipment, and facilities for the transportation of property in interstate or foreign commerce; to establish, observe, and enforce just and reasonable rates, charges, and classifications, and just and reasonable regulations and practices relating thereto and to the manner and method of presenting, marking, packing, and delivering property for transportation, the facilities for transportation, and all other matters relating to or connected with the transportation of property in interstate or foreign commerce.

Regulations of the Interstate Commerce Commission, 49 C. F. R. 192.9 (a) and (b) and 49 C. F. R. 193.9 (a) and (b) provides as follow:

49 C. F. R. 192.9 (a) *Distribution and securing of load.* No motor vehicle shall be driven nor shall any motor carrier permit or require any motor vehicle to be driven if it is so loaded, or if the load thereon is so improperly distributed or so inadequately secured, as to prevent its safe operation.

(b) *Doors, tarpaulins, tailgates and other equipment.* No motor vehicle shall be driven unless the tailgate, tailboard, tarpaulins, doors, all equipment and rigging used in the operation of said vehicle, and all means of fastening the load, are securely in place.

49 C. F. R. 193.9 (a) *Distribution and securing of load.* The load on every motor vehicle transporting property shall be properly distributed, and if necessary, secured, in order to prevent unsafe shifting of the load or unsafe operation of the vehicle.

(b) *Fastenings secure.* No motor vehicle shall be driven unless the driver thereof shall have satisfied himself that the tailboard or tailgate, tarpaulins, spare tires, and all means of fastening the load are securely in place.

Rule 21 and Rule 22 of National Motor Freight Classification No. A-3 M. F. I. C. C. No. 8, published and promulgated by the American Trucking Association are as follows:

Rule 21. *Heavy or Bulky Articles, Loading or Unloading.* Sec. 1. Where an article (or articles) in a single container or shipping form tendered, weighs 500 lbs. or more, or if the greatest dimension exceeds 8 ft. or greater and intermediate dimension each exceeds 4 ft., loading or unloading shall be performed by the shipper or consignee, as the case may be. If re-

quested, carriers will undertake, in behalf of the shipper or consignee, as the case may be, to employ additional help. No charge will be made for labor performed by the truck driver, but a charge of one dollar and fifty cents ($1.50) per hour or fraction thereof, for each man furnished, other than the truck driver, shall apply from time vehicle arrives at the place of pick-up or delivery until shipment is loaded or unloaded, as the case may be.

Exception—The provisions of Sec. 1 will not apply if such article (or articles), weighing less than 500 pounds:

(a) exceeds 8 feet but does not exceed 22 feet in its greatest dimension and does not exceed 2 feet in any other dimension, or

(b) if it does not exceed 10 feet in its greatest dimension and does not exceed 5 feet in its intermediate dimension and does not exceed 1 foot in its least dimension.

Rule 22. *Dunnage or Temporary Blocking, Racks, Standards, Supports, etc.* Any temporary blocking, flooring or lining racks, standards, strips, stakes, or similar bracing, dunnage or supports not constituting a part of the vehicle when required to protect and make shipments subject to other than LTL or AQ ratings or rates secured for transportation must be furnished and installed by the shipper, except that such materials as may be furnished by the shipper will be installed by the carrier at a charge for labor necessary for such installation at the rate of one dollar and fifty cents ($1.50) per hour or fraction thereof, for each man. When materials are furnished by the carrier, charge therefor will be as per tariffs lawfully on file with the Interstate Commerce Commission or State regulatory body having jurisdiction.

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OCTOBER TERM, 1959

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Petitioner

v.

GENERAL ELECTRIC COMPANY
Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

Respondent, General Electric, has asked this Court to dismiss Mason & Dixon's petition for certiorari, on three grounds:

(1) That General Electric was plainly entitled to indemnity because the key to the case is "who had the duty to brace" (Brief in Opposition, p. 6) and the record is clear that this duty fell solely upon Mason & Dixon, the motor carrier.

(2) That Mason & Dixon is now raising the question of its right to a jury trial for the first time.

(3) That the instant case presents no conflict with any prior decisions of this Court or the Circuits.

Each of Respondent's arguments will be considered in turn.

POINT I

Petitioner, Mason & Dixon, respectfully submits that General Electric, by its own position, concedes the correctness of Petitioner's contention that the instant decision is wrong and should be reviewed and reversed by this Court.

General Electric is apparently willing to stand or fall in this case on its oft-repeated claim that it, the shipper of the bulky goods, had no obligation either to load or brace the equipment on the Mason & Dixon truck.

Such a position ignores:

(1) The fact that the *sole* basis for recovery of the injured driver, Moretz, in the main case was the breach of a duty upon General Electric to load and brace the equipment.

(2) The fact that the written provisions of Rules 21 and 22 of the published tariff of Southern Motor Carriers, filed with the Interstate Commerce Commission, required General Electric to load and brace the goods.

(3) The opinion of the Fourth Circuit that " . . . the provisions of the tariff formed part of the contract between the shipper and the carrier in this case." (270 F. 2d 780 at 787)

(4) The fact that General Electric's own expert witness, Behme, who attempted to interpret the tariffs, testified:

> "Q. Was Rule 22 ever intended to shift the responsibility for bracing from the common carrier to the shipper?
>
> "A. You use the term responsibility for bracing. It states it is the shipper's responsibility to brace. It says it must be furnished and installed by the shipper." (R. p. 170)

Clearly, the original and primary duty to load and brace, *as between General Electric and Mason & Dixon*, lay with the shipper, General Electric. It is equally clear from the jury verdict below that General Electric breached that duty.

Thus, it is believed that General Electric's statement of the main issue involved in the instant case begs the question. Petitioner submits that the real issue in the instant case is the consequence of General Electric's admitted breach of duty to Mason & Dixon, not the existence of the duty itself. There is also the critical correlative question of whether, under *Weyerhaeuser S. S. Co. v. Nacirema Operating Co.*, 355 U. S. 563, 78 S. Ct. 438, 2L. ed 2d 491 (1958), the court or jury should determine the consequence of General Electric's breach in an action for indemnity.

POINT II

Respondent's contention that Mason & Dixon is here raising for the first time the question of its right to a jury trial and has, in effect, waived the same is not correct.

First of all, it is clear that the Fourth Circuit Court of Appeals expressly ruled on this aspect of the case in rejecting Petitioner's request for a rehearing (see Appendix B

of Petition for Certiorari). And it is well established that questions passed on by a Circuit Court of Appeals will be considered by this Court on certiorari even though such questions were not raised in the trial court (*Friend* v. *Talcott*, 228 U. S. 27, 33 S. Ct. 505, 57 L. ed. 718 (1913)).

Respondent has also overlooked the fact that Petitioner requested a jury trial on the question of indemnity both in the trial court and before the Fourth Circuit Court of Appeals. In the trial court (R. pp. 36-37), Petitioner requested the Court to submit General Electric's third-party action to the jury on interrogatories. Also, in its brief to the Fourth Circuit Court of Appeals, Petitioner argued:

> "*Weyerhaeuser, supra*, held that a shipowner had a right to a jury trial on the questions involving indemnity. Surely, there was no jury trial in the instant case on any issues of indemnity . . .
>
> "Should this court find that indemnity should not be denied to General Electric as a matter of law, the court would at the very best seem to be required to return this case for a proper jury trial on the indemnity issues." (Pp. 21-22 of Petitioners' brief to the Fourth Circuit Court of Appeals.)

Obviously, therefore, the question of Petitioners' right to a jury trial is properly before this Court for its consideration.

POINT III

A. Respondent argues that *Hagans* v. *Farrell Lines*, 237 F. 2d 477 (3rd Cir. 1956) is not in conflict with the opinion of the Fourth Circuit Court of Appeals in the instant case. But such a contention ignores the fact that the express holding of *Hagans* was:

"Where the parties have violated similar duties to the injured person, neither is entitled to relief against the other." (237 F. 2d 477 at 482.)

And:

". . . in the face of mutual violations, Farrell [the party seeking indemnity] is not entitled to full indemnity, and, of course, it cannot have contribution." (237 F. 2d 477 at 483.)

In the instant case, however, the Fourth Circuit Court of Appeals concluded that General Electric, despite its admitted breach of contract, was entitled to full indemnity (*General Electric Compnay* v. *Moretz*, 270 F. 2d 780 (4th Cir. 1959)). Nothing could be more obvious than the fact that the Third and Fourth Circuit Courts of Appeals have rendered divergent and contradictory decisions on the ultimate question presented by this case.

B. Petitioner also submits as significant that Respondent's Brief in Opposition does not in any way take issue with one of the two points presented in the Petition for Certiorari; Respondent does not deny Petitioners' allegation that this case, as it presently stands, holds that I. C. C. safety regulations (designed for the protection of the public) supersede the contractual obligation to load and brace heavy or bulk articles established by Rules 21 and 22 of the published Tariff of the Southern Motor Carriers on file with the I. C. C.

Petitioner, therefore, reiterates its position that the significant interpretation and application of 49 C. F. R. 192.9 (a) (b) and 193.9 (a) (b) by the Fourth Circuit Court of Appeals in the instant case merits review and clarification by this Court.

C. Respondent characterizes the instant case as "simply a common law negligence action" (Brief in

Opposition, p. 11) of little legal significance. This case, however, is not before this Court as a common law negligence action. It is before this Court as an action for implied indemnity, wherein the Fourth Circuit Court of Appeals, in the first instance, held that Respondent possessed a cause of action for implied indemnity, and then awarded indemnity without benefit of a jury and contrary to the mandate in *Weyerhaeuser, supra*. (See Petition for Certiorari, pp. 7-10).

D. Reference is made in the Petition for Certiorari (p. 13) to the case of *General Electric Company* v. *Irvin and The Mason & Dixon Lines* (Civil Action No. 1275, E. D. Tenn., October 9, 1958) then pending on appeal before the Sixth Circuit Court of Appeals (Docket No. 13,798). The decision in that case was announced by the Sixth Circuit on January 13, 1960 (though it is yet unreported). The district court opinion dismissing General Electric's third-party action for indemnity was affirmed. Though the Sixth Circuit Court of Appeals affirmed on another ground, it recognized the important questions presented by the instant case and left in full force and effect a district court holding that denied indemnity in a factual context identical in all essential respects to this decision.

In light of the important conflict of decisions which *General Electric Company* v. *Irvin and The Mason & Dixon Lines, Inc.* permits to stand, Petitioner respectfully submits that the urgent necessity for clarification of the concepts of implied indemnity are now even more urgently needed by Bench and Bar.

CONCLUSION

In view of the foregoing, Petitioner respectfully renews its request that a writ of certiorari be granted in the instant case.

Respectfully submitted,

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